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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

T.B., Allison Brenneise and Robert Brenneise, Plaintiffs, v. San Diego Unified School District, Defendant.	Case No. 08 CV 0028 WQH WMc **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THIRD AND FOURTH CLAIMS FOR RELIEF** Date: May 12, 2008 Time: 11:00 a.m. Dept.: 4 Judge: Hon. William Q. Hayes Complaint Filed: January 4, 2008 NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

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I. INTRODUCTION

Defendant San Diego Unified School District seeks dismissal of Plaintiffs' Third and Fourth Claims for Relief on the grounds that under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§1400 *et seq.* and California special education law, Education Code §§56000 *et seq.*, Plaintiffs have failed to state any claims upon which relief may be granted.

Plaintiffs' Third Claim for Relief seeks compensatory education for the District's alleged failure to implement the Decision rendered in the underlying due process hearing with the Office of Administrative Hearings ("OAH"). Plaintiffs have failed to state a claim because they lack standing to pursue such claim as they have *conceded* they are not a "party aggrieved" by the Decision as required to bring this claim under the IDEA. (*Levina v. San Luis Coastal Unified School District*, 514 F.3d 866, 868 (9th Cir. 2007).) In addition, Plaintiffs have failed to exhaust their administrative remedies to enforce the Decision with the California Department of Education ("CDE"). (*Robb v. Bethel School Dist. #403*, 308 F.3d 1047, 1050 (9th Cir. 2002).)

Plaintiffs' Fourth Claim for Relief, which seeks reimbursement of attorneys' fees incurred in pursuing a compliance complaint with CDE should also be dismissed for failure to state a claim. The evolution of the law on prevailing parties and attorneys' fees in IDEA matters demonstrates that parents are no longer entitled to recover attorneys' fees for compliance complaints as State complaint resolution processes do not bear the necessary "judicial imprimatur" as required by the Ninth Circuit in *Shapiro v. Paradise Valley Unified School District*, 374 F.3d 857, 865 (9th Cir. 2004), nor are they properly deemed "actions or proceedings" under the IDEA for which fees are available. Accordingly, the District requests that Plaintiffs' Third and Fourth Claims for Relief be dismissed with prejudice as Plaintiffs have failed to state claims upon which relief may be granted.

II. STATEMENT OF FACTS

Plaintiff T.B. ("Student") is a 13-year-old boy who until March 7, 2008 was enrolled in

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the District.[1] Student is eligible for special education and related services under the category of autistic-like behaviors, and has a health condition called Phenylketonuria ("PKU"). (See Hearing Decision at 4 attached as Exhibit A to the Amended Complaint ("AC").)

For the 2006-2007 school year, the District developed an Individualized Education Program ("IEP") for Student on August 30, 2006 and December 4, 2006. (*Id.* at 6.) During this time, Plaintiffs did not consent to the IEP and informed the District they disagreed with District assessments of Student and requested an independent educational evaluation ("IEE"). (*Id.* at 6.) Having not received consent to the IEP, the District filed a request for due process to implement the IEP for Student and to defend its assessments. (AC, ¶9.) The District filed a motion to amend its request for due process on December 15, 2006, which OAH granted on January 9, 2007. (*Id.* at ¶11.) Shortly thereafter, Student filed his own request for due process alleging the District's August 30 and December 4 IEPs denied Student a free appropriate public education ("FAPE"). (*Id.* at ¶12; Hearing Decision at 2-4.) Student also filed a motion to consolidate the two cases, which OAH granted on February 2, 2007. (AC, ¶¶12, 14.)

The District filed for due process to implement the August 30 and December 4 IEPs, as Student had not attended school since 2003. (Hearing Decision at 6, 23-25, 38.) Due to a history of disputes between the parties, Student was educated in his home by nonpublic agencies. (*Id.* at 6.) To transition Student from this home-based program to school, the District developed a comprehensive transition plan, which was part and parcel of the District's program offer set forth in the August 30 and December 4 IEPs. (*Id.* at 43.) Because Student had not attended school in the District, the hearing did not include any claims by either party regarding implementation of a District program. (Id. at 2-4.)

The due process hearing regarding the August 30 and December 4 IEPs and the District's assessments commenced on May 14, 2006 and took place over 27 days from May 14-June 1, June 11-13, June 19-20, and July 11-20, 2007. (*Id.* at ¶16.) Administrative Law Judge

[1] As of the date Plaintiffs' filed their Amended Complaint they informed the District and OAH they were moving out-of-state and therefore withdrew Student from the District. (See Exhibit A attached to the Request for Judicial Notice.)

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("ALJ") Susan Ruff presided over 18 issues raised at the hearing. (*Id.* at ¶18; Hearing Decision at 3 and 4.)

On October 3, 2007, ALJ Ruff issued a 75-page written Decision. (Hearing Decision, passim.) ALJ Ruff found the District prevailed on 15 out of the 18 issues, and determined that the District's proposed IEPs offered Student a FAPE in virtually every way. (*Id.* at 75; AC, ¶19.) As a result, the Hearing Decision authorized the District to implement its proposed December 4 IEP, including the transition plan. (Hearing Decision at 74-75) However, ALJ Ruff found some minor flaws with the offers, and determined that the District failed to adequately address Student's unique health care needs or to design an appropriate transition plan from Student's home program back to school. (Hearing Decision at 38, 45.) As a remedy, the ALJ modified the December 4, 2006 IEP to revise the health care plan and ensure a nurse is present to assist Student with gastrostomy tube ("g-tube") feedings."[2] (*Id.* at 74; AC, ¶26.) The ALJ also modified the transition plan to include Student's mother as a participant in the collaboration meetings for each phase of the transition plan. (Hearing Decision at 74; AC, ¶27.) The ALJ also clarified the transition plan by stating that until Student reaches phase IV of the transition, the District shall continue to fund the related services by nonpublic agencies, with the exception of one service provider who was no longer willing to provide services to the Student. (Hearing Decision at 74; AC, ¶27.)

On March 12, 2008, Plaintiffs filed the Amended Complaint to reverse the ALJ's Decision with respect to the issues they did not prevail on at the hearing, and to challenge whether the District was entitled to implement a school-based program and transition him from his home program at all. Inconsistently, they also seek a Court order that the District comply with the very same OAH Decision that they claim is erroneous and subject to reversal. The Amended Complaint also seeks to recover attorneys' fees they incurred in pursuing a compliance complaint against the District with CDE; fees to which they are not entitled as a

[2] Due to Student's PKU and his unwillingness to drink a special formula, his doctors fitted him with the g-tube so the formula can be poured directly into Student's stomach. (Hearing Decision at 5.)

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matter of law. (AC, ¶21, 23, 30-31, and 37.)

III. STANDARDS FOR GRANTING MOTIONS TO DISMISS

Under Federal Rules of Civil Procedure, rule 12(b)(6) a pleading may be dismissed when it fails to state a claim for relief. A "claim" means a set of facts which, if established, gives rise to one or more enforceable legal rights. (*Goldstein v. North Jersey Trust Co.,* 39 F.R.D. 363, 366 (S.D. N.Y. 1966).) A Rule 12(b)(6) dismissal is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." (*Balistreri v. Pacifica Police Department,* 901 F.2d 696, 699 (9th Cir. 1990).)

The scope of review for failure to state a claim is limited to the contents of the complaint. (*Clegg v. Cult Awareness Network,* 18 F.3d 752, 754 (9th Cir. 1994).) However, "a document is not 'outside' the complaint if the complaint specifically refers to the document and if its authenticity is not questioned." (*Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994).) In addition, on motions to dismiss, courts may also take judicial notice of matters of public record outside of the pleadings. (*Mack v. Southbay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986).) Plaintiffs have failed to state claims upon which relief may be granted, requiring this Court to dismiss Plaintiffs' third and fourth claims for relief under Federal Rule of Civil Procedure, rule 12(b)(6). Further, because the failure to exhaust administrative remedies is jurisdictional, this Court must alternatively dismiss under Federal Rule of Civil Procedure, rule 12(b)(1).

IV. ARGUMENT

Plaintiffs' Third Claim for Relief related to alleged violations of the IDEA after the due process hearing concluded should be dismissed for two reasons. First, Plaintiffs do not have standing to pursue this claim as they concede they are not aggrieved parties, and have failed to exhaust their administrative remedies. (*Levina v. San Luis Coastal Unified School District*, 514 F.3d 866, 868 (9th Cir. 2007); *Robb v. Bethel School Dist. #403*, 308 F.3d 1047, 1050 (9th Cir. 2002).) Likewise, Plaintiffs' Fourth Claim for Relief, which seeks reimbursement of attorneys' fees incurred in filing a compliance complaint with CDE, must also be dismissed as the IDEA

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does not contemplate recovery of attorneys' fees for filing complaints with State agencies and such process does not bear the necessary "judicial imprimatur" to confer prevailing party status. (20 U.S.C. §1415(i)(3)(B); *Shapiro v. Paradise Valley Unified School District*, 374 F.3d 857, 865 (9th Cir. 2004).) Thus, the Court should dismiss Plaintiff's Third and Fourth Claims for Relief.

A. The Third Claim For Relief Fails To State A Claim as Plaintiffs Lack Standing

Plaintiffs' Third Claim for Relief, which alleges the District failed to implement the OAH Decision, should be dismissed as Plaintiffs' are not aggrieved parties and have failed to exhaust their administrative remedies. The Third Claim for Relief alleges the District has not complied with the OAH Decision related to g-tube feeding and OT services raised in issues 10, 14, and 15. (AC, ¶25.) Specifically, Plaintiffs' allege OAH modified Student's December 4, 2006 IEP to include a school nurse in assisting with Student's g-tube feeding and such feeding must occur in the manner designated by Student's doctor. (*Id,* at ¶25.) Plaintiffs further allege OAH modified Student's transition plan, which ordered the District to continue providing and funding the related services through his current providers. (*Id.* at ¶27.) Plaintiffs allege the District failed to have a school nurse present to assist with the G-tube feedings and failed to provide Student with his OT services from this then-current provider. (*Id.* at ¶30.)

Under the IDEA, "any party aggrieved" by the findings and decision made in a due process hearing has the right to bring a civil action in State or federal court to appeal the findings and decision. (20 U.S.C. § 1415(i)(2)(A).) The Ninth Circuit recently held parties are aggrieved under the IDEA only if: (1) they have suffered an injury in fact; and (2) they are denied relief they affirmatively requested. (*Levina*, 514 F.3d at 869.) Here, Plaintiffs' do not aver any allegations in the Third Claim for Relief to demonstrate they have been aggrieved. More importantly, Plaintiffs have *conceded* they are not "party aggrieved" on the above issues. (AC, ¶21.) In Plaintiffs' Amended Complaint, Plaintiffs admit they are party aggrieved on every issue raised at the hearing *except* related to the g-tube feedings and OT services (issues 10, 14 and 15). (*Id.*) In fact, Plaintiffs' Third Claim for Relief pleads that they prevailed on the

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above issues at the administrative hearing.[3] (*Id.*) (34 C.F.R. § 300.151.) Their simultaneous request in the AC to challenge the decision and to enforce it is fundamentally incongruous.

In *Moubry v. Independent School District No. 696 (Ely),* 951 F.Supp. 867 (D. Minn. 1996), the parents sought to enforce the hearing officer's order that the speech therapist, who the parents contended was inappropriate, be required to receive proper training before providing services. They also sought to overturn the ruling that allowed services to be provided by that therapist at all. The court found that position to be "fundamentally flawed, for it impermissibly seeks protection from what, at this point, is only an anticipatorily adverse ruling by this Court." It therefore dismissed the enforcement claim on the grounds that the plaintiff was not an aggrieved party on that issue. (*Id.*, at 883, 885-86.) Likewise here, Plaintiffs are not aggrieved by an inadequate or inappropriate transition or by the manner in which the District's program has been implemented; they are aggrieved by the OAH-approved change of placement to a District program. Accordingly, their "enforcement" action fails to state a claim.

As a result, the Third Claim for Relief avers no basis to support a theory that a party who prevails on an issue can also be aggrieved on the same issue. As the IDEA provides for an appeal process for a "party aggrieved" through de novo review of the administrative record, Plaintiffs are hardly aggrieved by a decision which modified the December 4, 2006 IEP and transition plan related to the g-tube feedings and OT services.

B. The Third Claim for Relief Fails to State a Claim as Plaintiffs Have Not Exhausted Their Administrative Remedies

Moreover, although a decision rendered in the State agency is "a final administrative determination and binding on all parties" in accordance with California Education Code section 56505(h), enforcement of this State order should be first pursued through administrative means. (20 U.S.C. § 1415(l).) The California Code of Regulations set forth the procedures for

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[3] In their Amended Complaint, Plaintiffs have conceded that they are not aggrieved by issues 10, 14, and 15 because they believe that they have prevailed on them. For purposes of this motion only, the District is assuming the facts stated in the Amended Complaint are true. However, the District continues to believe that Plaintiffs have not substantially prevailed on any of the issues raised at the hearing.

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enforcement of an alleged failure to implement a due process hearing order. (Title 5, C.C.R. § 4650(a)(7)(B); *Wyner v. Manhattan Beach Unified School District,* 223 F.3d. 1026, 1029-30 (9th Cir. 2000).) As a result, there first should be an exhaustion of administrative remedies before filing in this Court if purported injuries could be redressed by administrative procedures and remedies. (*See Robb*, 308 F.3d at 1050 [finding if a plaintiff has alleged injuries under *any theory* that could be redressed *to any degree* by the IDEA's administrative procedures and remedies, the plaintiff must exhaust his or her administrative remedies before filing in court].)

Failure to exhaust such administrative remedies deprives the federal court of jurisdiction, and requires dismissal of the purported claim. (*Id.*, at 1048, n.1 [affirming dismissal for lack of subject matter jurisdiction]; *Hayes v. Unified School Dist. No. 377*, 877 F.2d 809, 810 (10th Cir. 1989) [court lacked jurisdiction to hear merits when plaintiffs failed to exhaust administrative remedies]; *Metropolitan Board of Public Educ. v. Guest*, 193 F.3d 457, 463 (6th Cir. 1999) [court exceeded its jurisdiction to the extent it ruled on issues from subsequent school years not at issue in administrative hearing]; *Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 283-84 (3d Cir. 1996) [claims arising after conclusion of administrative hearing and claims not raised in that hearing must be exhausted, and cannot be raised as part of a due process appeal]; *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 424 (1st Cir. 1985) [finding "for issues to be preserved for judicial review they must first be presented to the administrative hearing officer"]; *cf. Dreher v. Amphitheater Unified School Dist.*, 22 F.3d 228, 231 (9th Cir. 1994) [court properly found subject matter jurisdiction because the plaintiffs had exhausted their administrative remedies].)

As set forth in *Hoeft v. Tucson Unified School Dist.*, 967 F.2d 1298 (9th Cir. 1992), the IDEA's exhaustion requirement allows the states to address issues before suit and "embodies the notion that 'agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer.'" (967 F.2d at 1303 [citation omitted].)

In the present case, Plaintiffs are seeking compensatory education for the District's alleged failure to ensure the presence of a school nurse to assist Student's g-tube feeding and alleged failure to provide OT services under the modified transition plan. (AC, ¶¶30 and 31.)

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These issues were never raised in the hearing, and indeed, occurred after the hearing was concluded and a decision rendered. It is these types of allegations that Congress, the California Legislature, and the Ninth Circuit intended for CDE to remedy before proceeding to federal court.[4] Because there is nothing for the Court to review, and the Plaintiffs cannot be aggrieved by claims that were never heard or resolved by a State agency, the Court should dismiss, with prejudice, the Third Claim for Relief for failure to state a claim upon which relief may be granted and for lack of subject matter jurisdiction.

The District acknowledges that current Ninth Circuit authority holds that a plaintiff is not required to exhaust his or her administrative remedies when he or she simply seeks to enforce a final *unappealed* due process hearing order in his or her favor. (*Porter v. Board of Trustees of Manhattan Beach Unif. Sch. Dist.*, 307 F.3d 1064 (9th Cir. 2002).) However, it is clear that Plaintiffs are not seeking to enforce a favorable final decision. They are challenging the very same aspects of the decision that they are seeking to enforce, and therefore the decision is not final for purposes of enforcement. Furthermore, as explained above, the aspects of the decision they seek to enforce are not in their favor – they were in the District's favor as they are part and parcel of the District's December 4, 2006 IEP. Thus, exhaustion is required and *Porter* does not apply.

C. Plaintiffs' Fourth Claim for Relief Fails to State A Claim as They Are Not Entitled to Reimbursement of Attorneys' Fees And Costs Incurred in Pursuing a Compliance Complaint Under the IDEA

Plaintiffs' Fourth Claim for Relief should be dismissed as Plaintiffs are not entitled to reimbursement of attorneys' fees and costs incurred in pursuing a complaint with CDE. Plaintiffs' erroneously allege they are a "prevailing party" with respect to a compliance complaint they brought before CDE and therefore are entitled to recover the attorneys' fees they

[4] To the extent Plaintiffs are seeking a determination that Student has been denied a FAPE as the result of these failures to implement, a due process hearing through OAH is also an appropriate forum to address these concerns. (*Van Duyn v. Baker School Dist. 5J*, 481 F.3d 770, 777-78 (9th Cir. 2007); *County of San Diego v. California Special Educ. Hearing Office*, 93 F.3d 1458, 1465 (9th Cir. 1996) (county cannot contest eligibility category on appeal, where only placement was adjudicated in the administrative hearing).)

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incurred in pursuing such complaint. (AC, ¶37.) Not so. While parents may recover reasonable attorneys' fees as prevailing party in a due process hearing, findings from a State complaint resolution process do not convey prevailing party status on parents.

Under the IDEA and California law, to address alleged violations of the IDEA, parents have two options: (1) they may file a request for due process with an administrative agency such as OAH; or (2) they may a file a "compliance complaint" with the State Educational Agency ("SEA"), like CDE. (Cal. Ed. Code, §56505; Title 5, C.C.R. § 4650(a)(7)(B).) The regulations to the IDEA contains a complaint resolution process which is separate and different from a due process hearing, and provide that SEAs must adopt written procedures for the filing of a complaint with the SEA. (34 C.F.R. §300.151.) Pursuant to this federal regulation, the California Code of Regulations set forth the process for filing a "compliance complaint" with CDE. (Title 5, C.C.R. § 4650(a)(7)(B).) Nowhere in these regulations, whether State or federal, does it state parents may recover attorneys' fees incurred in pursuing a State complaint.

In sharp contrast, the IDEA states that parents may recover attorney's fees as prevailing parties for pursuing due process claims at the administrative or judicial level: "The court, in its discretion, may award reasonable attorneys' fees" for "any action or proceeding brought under this section ..., as part of the costs to the parents of a child with a disability who is the prevailing party." (20 U.S.C. § 1415(i)(3)(B).) Thus, to be entitled to reimbursement for attorneys' fees and costs incurred under the IDEA, Plaintiffs would have to prove they were a prevailing party under section 1415(i)(3). However, compliance complaints are not brought under Section 1415, and are in fact not mentioned in the IDEA at all; as described above, compliance complaints are a creature of the regulatory process. (*Vultaggio v. Board of Education*, 343 F.3d 598, 601 (2d Cir. 2003); 34 C.F.R. § 300.151.) Indeed, a plain reading of the statute would mean attorneys fees and costs incurred related to compliance complaints would be not reimbursable under Section 1415 of the IDEA.

Despite the plain meaning of the statute, the Ninth Circuit held in 2000 that attorneys' fees were available for the successful pursuit of a compliance complaint pursuant to Oregon's Complaint Resolution Procedure in *Lucht v. Molalla River Sch. Dist.*, 225 F.3d 1023, 1029 (9th

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Cir. 2000). There, the Court reasoned that the complaint resolution process was an "action or proceeding" under the IDEA. (*Id.* at 1027-29.) However, Ninth Circuit cases decided since *Lucht* demonstrate that this holding is no longer good law.

In 2004, the Ninth Circuit adopted the United States Supreme Court's decision in *Buckhannon Board & Care Home v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001) and applied the holding in *Buckhannon* to IDEA claims. (*Shapiro v. Paradise Valley Unified School District*, 374 F.3d 857, 865 (9th Cir. 2004).) Under *Buckhannon*, to be considered a prevailing party, there must be both a material alteration of the legal relationship of the parties and a "judicial imprimatur" on the change. (*Buckhannon,* 532 U.S. at 604-05.) The Supreme Court rejected the previously accepted rule known as the "catalyst theory," which had permitted a plaintiff to obtain fees as a prevailing party when the litigation provided the impetus for a defendant's change in conduct, regardless of whether a legal ruling in the plaintiff's favor had ever been obtained. (*Id.* at 601, 605.) In *Shapiro*, the Ninth Circuit held that *Buckhannon's* "judicial imprimatur" rule applied to attorneys' fee demands under the IDEA. (*Shapiro*, 374 F.3d at 865.) Thus, under federal law, a parent cannot be deemed prevailing party for purposes of the IDEA's fee shifting provision unless the relief the parent obtains has been judicially sanctioned in some manner.

As a result, *Lucht* has been superseded by the judicial imprimatur rule announced in *Buckhannon* and *Shapiro.* (*Buckhannon*, 532 U.S. at 604-05; *Shapiro*, 374 F.3d at 857.) The *Lucht* decision, decided before *Buckhannon* and *Shapiro*, did not address whether a compliance determination by the State agency bears the necessary "judicial imprimatur" required to achieve prevailing party status under the IDEA.

Following *Shapiro*, in 2006, the Ninth Circuit reaffirmed the test for determining a parent's eligibility for an attorneys' fee award: a prevailing party is defined as a parent who "succeed[s] on any significant issue in *litigation* which achieves some of the benefit [that party] sought in bringing the suit" and alters the legal relationship between the parties. (*Park v. Anaheim Union High School District*, 464 F.3d 1025, 1034-35 (9th Cir. 2006) [emphasis added].) In the present case no litigation has in fact taken place and therefore *Park* is inapt.

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The United States' Department of Education ("DOE") has also addressed the very question of whether parents are entitled to recover attorneys' fees incurred in pursuing compliance complaints, further undermining *Lucht*. In the comments to the 2006 IDEA regulations that created and authorized the compliance complaint process, the DOE explicitly states that attorneys' fees are not addressed in 34 C.F.R. § 300.151 because "the State complaint process is *not* an administrative proceeding or judicial action, and, therefore, the awarding of attorneys' fees is not available under the Act for State complaint resolutions." (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46602 (August 14, 2006), District's Request for Judicial Notice, Ex. B.) While courts are not generally bound by an agency's interpretative regulations, the DOE's interpretation in this case should be given particular force since the compliance complaint process is a creature of the IDEA's regulatory scheme in the first place. (*Vultaggio*, 343 F.3d at 601.)

In addition, the reasoning of *Lucht* has not been followed by other circuits, and even by a district court within the Ninth Circuit, all of whom have unanimously concluded, like the DOE, the compliance complaint regulatory process is not an "action or proceeding" pursuant to Section 1415 for which attorneys' fees and costs are available. (*Vultaggio*, 343 F.3d at 601; *Megan C. v. Indep. Sch. Dist. No. 625*, 57 F.Supp.2d 776, 783, 787 (D.Minn.1999) [holding the compliance complaint process under the IDEA is not a proceeding brought under § 1415]; *Melodee H. v. Department of Educ.*, 374 F.Supp.2d 886, 891-893 (D.Haw. 2005) [declining to extend *Lucht*'s reasoning].) The court should therefore find that Plaintiffs' Fourth Claim for Relief fails to state a claim and dismiss such claim with prejudice.

V. CONCLUSION

Based upon the foregoing, it is respectfully requested that the Court dismiss Plaintiffs' Third and Fourth Claims for Relief with prejudice for failure to state any claim upon which relief may be granted and for lack of subject matter jurisdiction. Under the IDEA, a party has standing to appeal a decision of an administrative hearing officer when he is a "party aggrieved." In this case, Plaintiffs have *conceded* in their Amended Complaint they are not the

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requisite party aggrieved for the claims raised in the Third Claim for Relief. In addition, Plaintiffs have failed to exhaust their administrative remedies. Indeed, in a time of fiscal crisis, exhaustion principles and judicial economy dictate that any alleged claims regarding failure to implement a student's IEP should be brought before CDE and/or OAH.

Plaintiffs' Fourth Claims for Relief should equally be dismissed as the law dictates that parents who pursue compliance complaints through CDE are not entitled to recover their attorneys' fees as such process is not subject to the fee shifting provisions of the IDEA, and, in any case, any favorable ruling in that forum does not bear the necessary judicial imprimatur required by the United States Supreme Court and the Ninth Circuit to confer prevailing party status. The Court should therefore dismiss, with prejudice, Plaintiffs' Third and Fourth Claims for Relief.

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